

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF OF APPELLANT AND APPENDIX

IN THE
United States Court of Appeals

599

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,189

MARCELLA S. HALSTEAD, *Appellant*

v.

JOHN SPRY, JEAN SPRY BORDLEY and WALTER E. GILLORIST,
Administrator of the Estate of ELIZABETH SPRY, *Appellees*

Appeal from an Order of the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 13 1968

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3900 Watson Place

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,189

MARCELLA S. HALSTEAD, *Appellant*

v.

JOHN SPBY, JEAN SPBY BORDLEY and WALTER E. GILLCRIST,
Administrator of the Estate of ELIZABETH SPBY, *Appellees*

Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue presented for decision in this appeal is:

Whether Appellant is a proper party to bring the cause of action set out in Appellant's Amended Complaint (Applt. App. 3a). This case has not been before this Court before.

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is based U.S. Code, Section 1291. The jurisdiction of the lower Court is based on Title 11, Sec. 521, of the D.C. (1967 Ed.) and 28 U.S. Code, Section 22. Judgment was entered under Rule 58.

STATEMENT OF THE CASE

In this action Appellant sues to recover her share in the assets of her mother's estate, Elizabeth Jepson Spry, who lived in Chicago, Ill. up to the time of her death in 1945. The existence, amount and nature of these assets were unknown to Appellant and affirmatively concealed from Appellant by said sister through fraud, conspiracy, and connivance with the defendants John Spry and Jean Spry Bordley. Elizabeth Spry lived with her mother until the time of her death in 1945 and then moved to Washington (Applt. App. 3a). Said sister of Appellant died Dec. 10, 1965. Said assets are listed in the inventory of that estate, in the Administration in the U.S. District Court. Defendant Walter Gillerist is Administrator (Applt. App. 4a).

The Court below granted Defendants' Motion to Dismiss on the ground that "Plaintiff is not the proper party to bring this action."

Without citing any legal authorities supporting his conclusion, the Court below concludes in his opinion:

"such an action as this can only be asserted against the personal representative of Elizabeth Spry. Under the circumstances the Plaintiff's remedy if any, is to bring an appropriate proceeding in a proper jurisdiction for the appointment of an administrator of the estate and the cause of action here sought to be asserted should be asserted by the administrator when appointed."

ARGUMENT

Appellant submits that she should not be subjected to the expense and inconvenience of having to apply for administration of her mother's estate in Illinois at this late date, when the assets in question are now in the District of Columbia and within the jurisdiction of the District Court. The authorities which follow sustain such a conclusion:

"33 *Corpus Juris Secundum* 124, the right of a personal representative to sue: In a number of jurisdic-

tions, either by virtue of statutory enactment or on the theory that for this purpose, an executor or administrator represents the creditors, it is held that the personal representative may sue to avoid a conveyance or transfer by decedent, on the ground that it was fraudulent as against creditors, *although creditors may be regarded as not limited to remedies through the estate in administration,*" citing:

In re Haber's Estate, 270 N.Y.S. 605, where the court said:

"Challenge is made of the jurisdiction of this court to continue an inquiry with respect to property, the proceeds of a business conducted by the deceased but claimed by the respondent, his widow to have been purchased from him for her before his death. She sold the business after the death and if the court has jurisdiction, it may determine whether the proceeds belong to respondent or to his estate

There is no doubt that under the Debtor-Creditor laws, a creditor need not pursue through the forum of an estate administration, his remedies against the property transferred in fraud of creditors (italics supplied)." p.

In *Nunnally v. Wilder*, 117 Appeals D.C. 377, 330 F. 2d 843 (1964), the lower court concluded, as a matter of law that in the light of the provisions of the Statute for the Administration of Estates, only the bank, the administrator of the estate was authorized to sue on claims (arising out of a business partnership in which one of the partners had died), and that the residuary legatee of the partner's estate had no standing to sue.

This court, however, concluded on appeal that the sole existing residuary legatee had standing to institute an action which the bank executor could have brought but failed to bring prior to the closing of the estate.

CONCLUSION

The decision of the Court Below should be reversed.

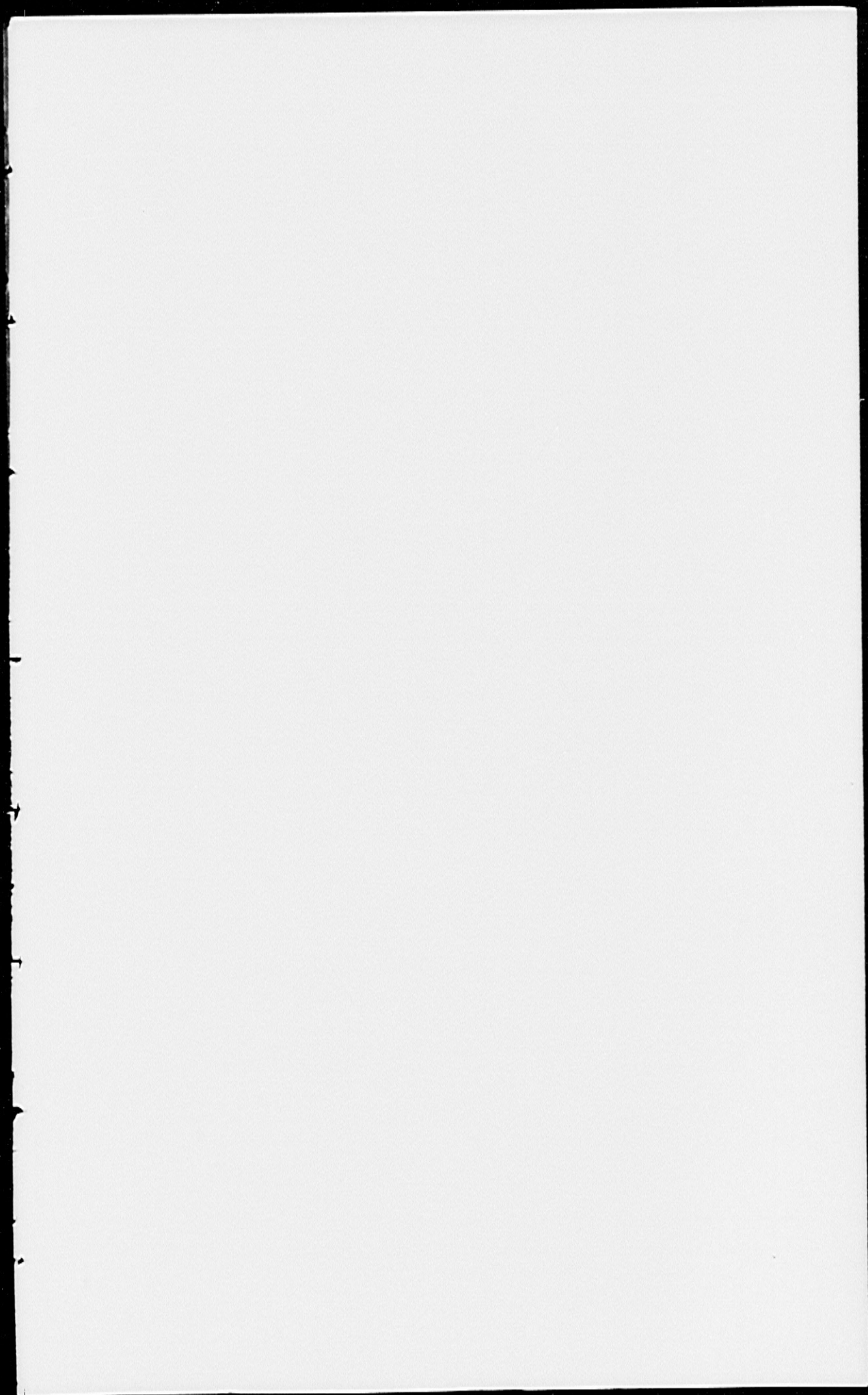
J. STERLING HALSTEAD

Attorney for the Appellant

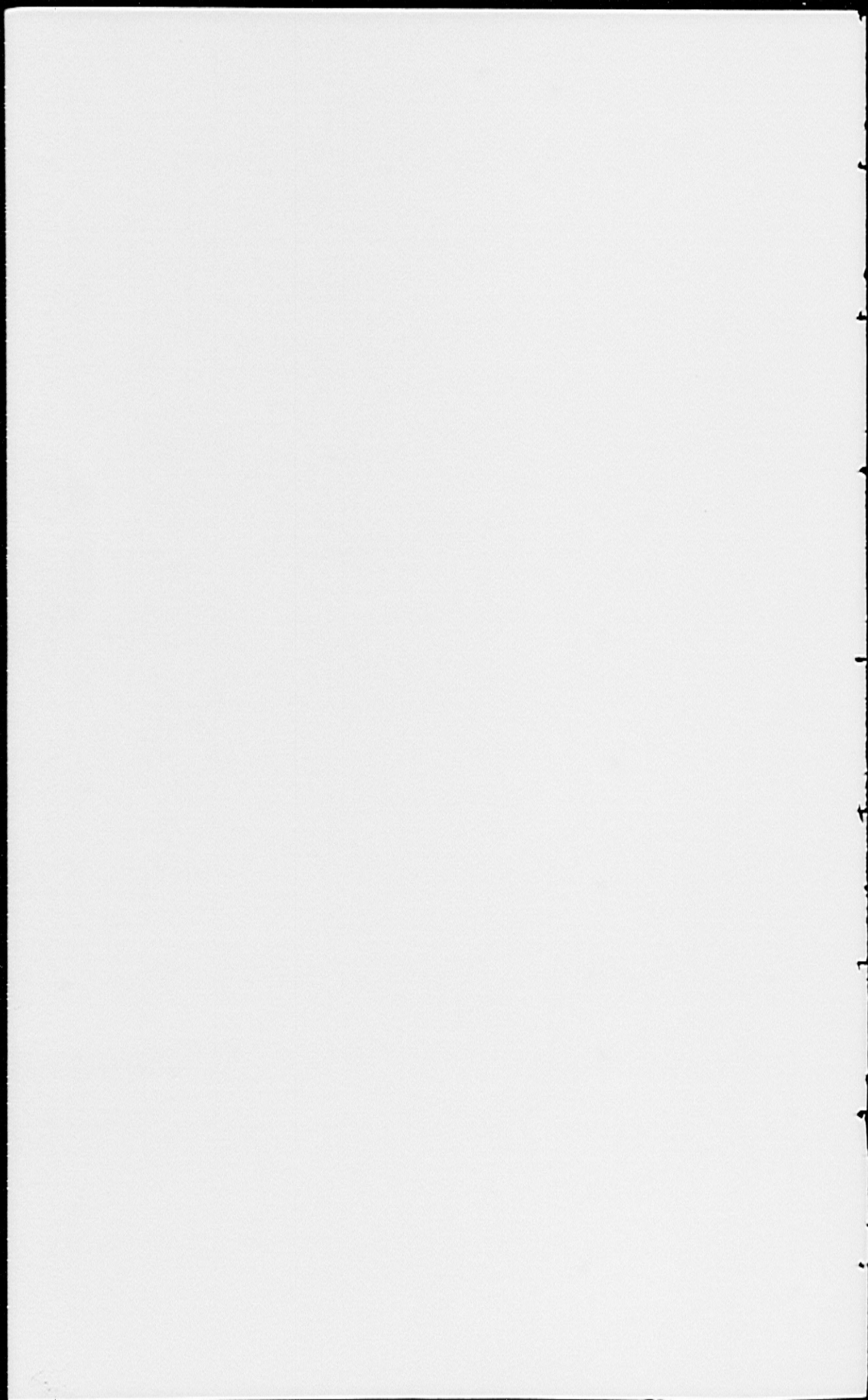
3900 Watson Place, N.W.

Washington, D.C. 20016

Telephone No. 333-4071



APPENDIX



APPENDIX

Docket Entries

- Dec. 27, 1967—Complaint filed
- Dec. 26, 1967—Summons (3 copies, Complaint 3 copies issued) Nos. of complaint 172 served 1-15-68, no. 3, served-12-29-67.
- Jan. 19, 1968—Answer of defendant, to complaint c/m 1-19-68 appearance of Walter E. Gillcrist filed.
- Jan. 22—Motion Defendant 2 to dismiss — & A c/m 1-22-68 L'Hommodieu & O'Grady. filed.
- Feb. 2—Statement in opposition by plaintiff to defendant John Spry c/m 2-6-68
- Feb. 5—Interrogatories of Defendant No. 3 to plaintiff c/m 2-5-68
- Feb. 21—Answer of Plaintiff to Interrogatories c/m 2-14-68 filed.
- Feb. 24—Motion of Plaintiff for opportunity to present oral argument 2-26-68 filed.
- Feb. 28—Opposition of defendants to plttf. motion to present oral argument; P&A's: c/m 2/28/68. filed
- Mar. 19—Motion of plttf to consolidate C.A. 3252-67 with C.A. 1881-66; c/m 3-19-68; M.C. filed
- Mar. 20—Appearance of Edgar T. Bellinger for plttf. filed.
- Mar. 20—Reply of plttf to def't's opposition to motion to present oral argument; c/m 3-15-68. filed
- Mar 22—Withdrawal of motion to consolidate as per counsel. filed
- Apr. 22—Order vacating order of February 23, 1968 and setting motion to dismiss for hearing on April 23, 1968. (N) Hart, J.

- Apr. 23—Consent order continuing hearing on defendants' motion to dismiss an additional two weeks to a day to be set by the Clerk. (N) Holtzoff.
- May 8—Consent of counsel for defts. to pltffs. filing an amended complaint. filed
- May 8—Amended complaint; c/m 5-6-68. filed
- May 9—Withdrawal of motions by defts. 1 & 2 to dismiss as per counsel. filed.
- May 14—Motion of defts. # 1 & 2 to dismiss; P&A; c/m 5/14/68, M.C. filed
- May 24—Opposition of plaintiff to motion to dismiss; c/m 5/24/68. filed
- June 11—Order granting defendants, Jean Spry Bordley's and John Spry's motion to dismiss. (N) Holtzoff, J.
- July 2—Notice of appeal by pltff. from order of 6/11/68; copies mailed to R. A. Fitzpatrick and W. E. Gillerist; deposit \$5.00 by Halstead. filed
- July 9—Cost bond on appeal by plaintiff in amount of \$2500.00 with National Surety Corporation approved. (fiat) (Sirica, J.) filed
- Aug. 6—Record on appeal delivered to USCA; Deposit by J. Stearling Halstead \$1.25.
- Aug. 6—Receipt from USCA for original papers. filed
- Sept. 16—Excerpt transcript of proceedings June 4, 1968, pages 4. (Rep. Gerald Nevitt) filed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 3252-67

MARECELLA S. HALSTEAD, 3900 Watson Place, N. W.,
Washington, D. C., *Plaintiff*,

v.

JOHN SPRY, and JEAN SPRY BORDLEY, 1701 16th Street,
N. W., Washington, D. C.,

and

WALTER E. GILLCRIST, Administrator of the Estate of
ELIZABETH SPRY, Deceased, 1317 F Street, N. W.,
Washington, D. C., *Defendant*.

**Amended Complaint for Declaratory Judgment, Accounting
and Damages**

1. Plaintiff and defendants John Spry and Jean Spry Bordley are residents of the District of Columbia. Defendant Walter E. Gillcrist is the duly appointed and qualified administrator of the estate of Elizabeth Spry, deceased, Administration No. 115,600 and is sued as such. The amount in controversy exceeds \$10,000.

2. Plaintiff and defendant John Spry and decedent Elizabeth Spry are the only children of Elizabeth Jepson Spry who died January 7, 1945, domiciled in Chicago, Illinois. On information and belief plaintiff avers that following the death of the said Elizabeth Jepson Spry intestate, said Elizabeth Spry, who resided with her mother in Chicago, fraudulently, with intent to deprive plaintiff of her lawful inheritance converted the assets of the decedent for her own use and benefit without right or authority. The fact of this fraudulent conversion was not known to plaintiff until after the death of her sister, the said Elizabeth Spry, on December 10, 1965, inasmuch as the said Elizabeth Spry did fraudulently conceal from plaintiff assets belonging to the estate of their mother, the aforesaid Eliza-

beth Jepson Spry, as well as the fact that she had converted them. At the time of her death said Elizabeth Spry was domiciled in the District of Columbia where she then resided alone at 4201 Cathedral Avenue, N. W.

3. Following the death of said Elizabeth Spry, plaintiff first learned of a number of stocks and bonds either registered in the decedent's name or in hers and that of defendant Jean Spry Bordley which plaintiff understands are, and were, in fact assets of the estate of the aforesaid Elizabeth Jepson Spry. Additionally, plaintiff discovered and so avers that various articles of personal property, such as jewelry, antique furniture, and various pieces of china and glassware, and other property, the identity of which is not known to plaintiff at this time, which is allegedly the property of said decedent Elizabeth Spry or defendant Jean Spry Bordley also is in fact actually the property of the estate of the aforesaid Elizabeth Jepson Spry. Despite the fact that there now appears to have been substantial assets belonging to the estate of the said Elizabeth Jepson Spry, no administration of her estate was ever had nor was any personal representative lawfully appointed to collect the assets and administer the estate of the aforesaid Elizabeth Jepson Spry.

4. On information and belief plaintiff avers that subsequent to the aforesaid fraudulent conversion by said decedent Elizabeth Spry, there came a time when said defendant Jean Spry Bordley became aware of the aforesaid conversion and concealment of the assets of the estate of Elizabeth Jepson Spry by said decedent Elizabeth Spry. Nevertheless, rather than revealing this information to plaintiff, said Jean Spry Bordley then did conspire with said Elizabeth Spry to defraud plaintiff of her rightful share of inheritance of her mother's estate by continuing to conceal the existence of the assets and the fraudulent conversion by said decedent Elizabeth Spry. Both said defendants then did enjoy the benefits of the unlawful conversion including dividends and interest from investments belonging to the estate of the said Elizabeth Jepson Spry.

5. Plaintiff on information and belief avers that some of the converted property belonging to the estate of the aforesaid Elizabeth Jepson Spry is now in the possession of defendant Walter E. Gillcrist, as administrator of the estate of said decedent Elizabeth Spry and of said defendant Jean Spry Bordley.

6. As a result of the actions of decedent Elizabeth Spry and defendant Jean Spry Bordley, plaintiff suffered damages approximating one hundred and twenty-five thousand dollars (\$125,000.00).

WHEREFORE plaintiff respectfully demands

1. That the Court require an accounting by defendants Jean Spry Bordley and Walter E. Gillcrist, as administrator of the estate of Elizabeth Spry, of all property of the estate of Elizabeth Jepson Spry, including property purchased with fruits of the unlawful conversion in their possession and control;

2. That the Court give judgment against said defendants Jean Spry Bordley and Walter E. Gillcrist, as administrator of the estate of Elizabeth Spry for damages for the aforesaid fraud and conspiracy in the amount of one hundred and twenty-five thousand dollars (\$125,000.00); and

3. That the Court appoint an administrator *ad colligendum bona defuncti* to collect the assets of the estate of Elizabeth Jepson Spry in the District of Columbia, and

4. For such other relief that the Court deems proper.

MARCELLA S. HALSTEAD

EDGAR T. BELLINGER
POPE, BALLARD & LOOS
700 Brawner Building
888 Seventeenth Street, N. W.,
Washington, D. C. 20006
Attorneys for Plaintiff
298-8600

Certificate of Service

I, Edgar T. Bellinger, hereby certify that I mailed, postage prepaid, a copy of the foregoing Amended Complaint For Declaratory Judgment, Accounting And Damages to Richard A. Fitzpatrick, Esq., 1627 K Street, N. W., Washington, D. C. 20006, attorney for John Spry and Jean Spry Bordley, and to Walter E. Gillerist, Esq., 1317 F Street, N. W., Washington, D. C., this 6th day of May, 1968.

EDGAR T. BELLINGER

Opinion of the Court

The Court: The Court is of the opinion that the plaintiff is not the proper party to bring this action. She is the beneficiary of the deceased Elizabeth Jepson Spry. She claims that the defendants concealed certain assets that should have belonged to the estate of the deceased, Elizabeth Jepson Spry.

Such a cause of action, if it exists, can be asserted only by the personal representative of Elizabeth Jepson Spry.

Under the circumstances, the plaintiff's remedy, if any, is to bring an appropriate proceeding in a proper jurisdiction for the appointment of an administrator of the estate and the cause of action here sought to be asserted should be asserted by the administrator when appointed.

Under the circumstances, the Court feels it unnecessary to pass upon the question of statute of limitations or the question of laches.

The motion is granted for the reasons just set forth, and counsel may submit an appropriate order.

• • • • •

Certified as the official transcript of excerpts from the above-captioned proceedings.

Official Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 3252-67

MARCELLA S. HALSTEAD, *Plaintiff*

v.

JOHN SPRY, ET AL., *Defendants*

Order

This cause having come on for hearing on the 4th day of June, 1968, pursuant to a Motion to Dismiss filed by the Defendants, John Spry and Jean Spry Bordley, on the 14th day of May, 1968 and Opposition thereto filed by the Plaintiff, Marcella S. Halstead, on the 24th day of May, 1968, and it appearing that the Plaintiff, ~~an heir at law of Elizabeth Jepson Spry, is claiming assets alleged to have been fraudulently concealed by the defendant, Jean Spry Bordley and decedent Elizabeth Spry, which assets should have belonged to the estate of said Elizabeth Jepson Spry, who died in Chicago, Illinois, in 1945; and it further appearing that said claim can only properly be asserted against the administrator of the Estate of Elizabeth Jepson Spry in a proper jurisdiction; and it further appearing that the plaintiff is not a proper person to bring the instant action;~~ it is by the Court this 11 day of June, 1968,

ORDERED, ADJUDGED and DECREED that the defendants, Jean Spry Bordley's and John Spry's Motion to Dismiss be and the same is hereby granted.

ALEXANDER HOLTZOFF
Judge

Notice of Appeal

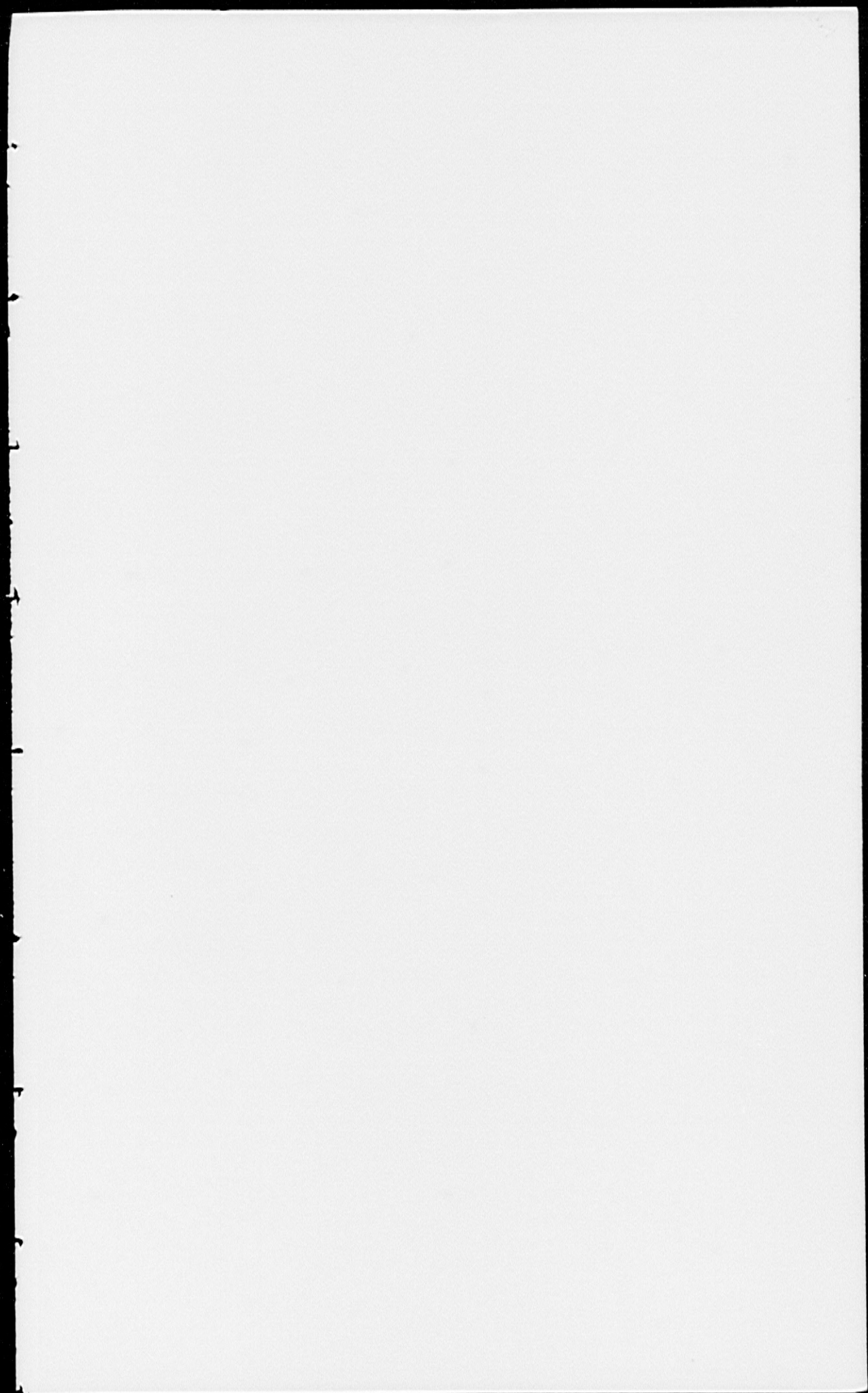
Notice is hereby given this 2nd of July 1968, that the Plaintiff, Marcella S. Halstead hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 11th day of June 1968, in favor of the Defendants John Spry, Jean Spry Bordley and Walter E. Gillerist, administrator of the estate of Elizabeth Spry, deceased against said Plaintiff.

J. STERLING HALSTEAD
Attorney for the Plaintiff

Will the Clerk please send copies of the foregoing Notice of Appeal to the following:

Richard A. Fitzpatrick, Esq.
1627 K Street, N. W.
Washington, D. C.
Attorney for John Spry and
Jean Spry Bordley

Walter E. Gillerist, Esq.
1317 F Street, N. W.
Washington, D. C.
Administrator of the Estate
of Elizabeth Spry, deceased.



Brief for Appellees John Spry and Jean Spry Bordley

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,189

MARCELLA S. HALSTEAD, Appellant

v.

**JOHN SPRY, JEAN SPRY BORDLEY and WALTER E. GILLCRIST,
Administrator of the Estate of ELIZABETH SPRY, Appellees**

**Appeal From the United States District Court for the
District of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 13 1969

Nathan J. Paulson
CLERK

RICHARD A. FITZPATRICK

1627 K Street, N. W.

Washington, D. C.

Attorney for Appellees

John Spry and Jean Spry
Bordley

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OTHER REFERENCES

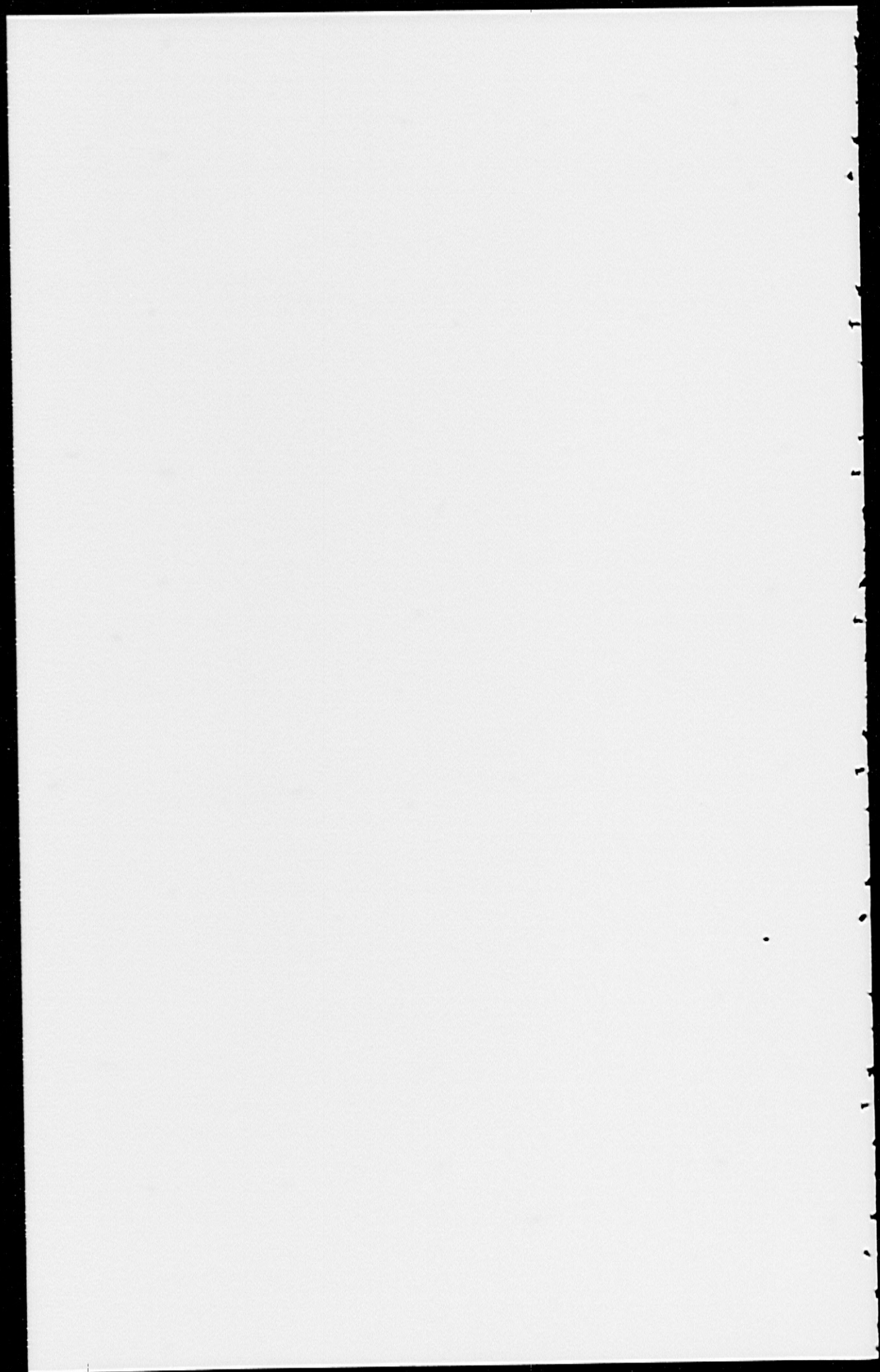
Title 20, D.C. Code (1967 Ed.), Section 1329	4
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QUESTIONS PRESENTED

In the opinion of the appellees, the following questions are presented:

1. Whether the appellant can seek in the District of Columbia an accounting of the estate of her mother who died twenty-three (23) years earlier in Chicago, Illinois?
2. Whether the appellant's demand for an accounting is barred by the statute of limitations?
3. Whether the appellant's demand for an accounting is barred by the doctrine of laches?
4. Whether the appellant should be allowed, in a separate action, to assert a claim to property already before the United States District Court for the District of Columbia?

*This case has not previously
been before this Court*



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,189

MARCELLA S. HALSTEAD, *Appellant*

v.

JOHN SPRY, JEAN SPRY BORDLEY and WALTER E. GILLCRIST,
Administrator of the Estate of ELIZABETH SPRY, *Appellees*

Appeal From the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES,
JOHN SPRY and JEAN SPRY BORDLEY

COUNTERSTATEMENT OF THE CASE

Appellee John Spry is the brother of both appellant, Marcella S. Halstead, and the decedent Elizabeth Spry. Jean Spry is the daughter of John Spry, and the surviving joint tenant of certain property in the names of Elizabeth Spry and Jean Spry Bordley.

In May, 1968 appellant filed a complaint in the United States District Court for the District of Columbia, asking for an accounting of the estate of the appellant's mother, Elizabeth Jepson Spry, who died in Chicago, Illinois, twenty-three (23) years earlier. (appellant's brief, pg. 3a)

Appellees, John Spry and Jean Spry Bordley, filed a motion to dismiss the complaint on the grounds of limitations, laches and the fact that the property in question was already the subject of a civil action in the District Court for the District of Columbia in Civil Action No. 1881-66.

The Court below did not address itself to the grounds urged by the appellees, but rather dismissed the complaint of the appellant on the grounds that appellant's remedy, if any, is to bring an action in an appropriate jurisdiction for the appointment of an administrator of the estate of Elizabeth Jepson Spry, and then have the administrator assert the cause of action urged by the appellant. (appellant's brief, page 6a)

SUMMARY OF ARGUMENT

I

The appellant is asserting a cause of action based on property belonging to appellant's mother who died in Chicago, Illinois in January, 1945. The appellant has waited too long, chosen the wrong jurisdiction and failed to seek the appointment of a personal representative. Her cause fails for each and all of those reasons. It is respectfully urged that the appellant, after twenty-three (23) years, cannot seek an accounting of her mother's estate *anywhere*, but assuming, *arguendo*, she can, it has to be in Chicago, Illinois, and it must be an action pursued by the duly appointed personal representative of the estate.

II

The appellant has waited twenty-three (23) years to seek an accounting of her mother's estate. A bare and superficial allegation of fraud will not avoid the obvious fact that the appellant's claim is barred by the Statute of Limitations.

III

The appellant has waited twenty-three (23) years to seek an accounting of her mother's estate. She now alleges a fraud on the part of the decedent, Elizabeth Spry and appellee, Jean Spry Bordley. Appellant alleges that the fraud did not become known until the death of Elizabeth Spry. Appellant has waited twenty-three (23) years, since the death of her mother, and two and one-half (2½) years since the death of her sister to bring the instant action. Appellant is therefore barred by the doctrine of laches.

IV

The appellant, in an awkward and transparent effort to proliferate litigation, is seeking an accounting from the appellee-administrator, as to assets already before the United States District Court for the District of Columbia in Civil Action No. 1881-66.

ARGUMENT

I

The appellant is not a proper person to bring the instant action for accounting. Such an action, if it can be brought at all, must be brought by a duly appointed personal representative in Chicago, Illinois, where the decedent was domiciled at the time of her death.

There is, of course, a serious question as to whether the instant action may be maintained anywhere. However, it is clear that the instant action could only be maintained

where the appellant's mother died—Chicago, Illinois, and is only properly assertable by a duly appointed personal representative.

Title 20, D.C. Code (1967 Ed.), § 1329 provides:

“§ 20-1329. Creditor's rights against property of non-resident decedent; limitation (a) On the death of a person not domiciled in the District of Columbia at the time of his death so much of his real and personal estate in the District of Columbia as may be necessary for the payment of just claims against him of creditors and persons domiciled in the District of Columbia are also subject of administration under authority and direction of the Probate court, irrespective of the personal estate of the decedent at his place of domicile or elsewhere. (b) The prosecution of claims referred to by subsection (a) of this section shall be commenced within six months after the death of the decedent.”

Assuming, *arguendo*, that the appellant can treat herself as a creditor of her mother, it becomes clear that appellant is approximately twenty-two and one-half (22½) years late in asserting her claim.

In the case of *Stitt v. Simpson*, D.C. Mun. App., 154 A.2d 719 (1959), the Municipal Court of Appeals, commenting on the above quoted proviso, stated at page 720:

“However, our question is not whether the proviso places a time limitation on the grant of ancillary administration, but is whether it places a time limitation on the filing of an action by a local creditor against an ancillary administrator. As far as we can ascertain the question has never been answered. The nearest case in point is *Gearheart v. Bank of Commerce & Savings of Washington, D.C.*, D.C. D.C., 138 F.Supp. 472, 473, decided by Judge Youngdahl. There it was held that if no local creditor asserts a claim within the six months' period, a resident debtor must honor the demands of the domiciliary fiduciary. No local

creditor was there involved, but in the course of the opinion it was said:

'It thus appears that Congress intended for local creditors to have protection for a limited period of time from the inconvenience which attaches to pursuing their claims against a non-resident decedent. When the six months expires, however, even though their claims are not barred, resident creditors no longer are afforded this protection but must go to the decedent's domicile to settle their claims.' "

It seems apparent that the only jurisdiction where this action could be maintained would be the domicile of the decedent Elizabeth Jepson Spry. However, it is urged, that after a delay of twenty-three (23) years, no one, be it a personal representative or a creditor, should be allowed to maintain the instant action in *any* jurisdiction.

II

The appellant is barred from maintaining this action by the statute of limitations.

The appellant, unintentionally, expresses this argument when she complains:

"... she should not be subjected to the expense and inconvenience of having to apply for administration of her mother's estate in Illinois at this late date,"
(appellant's brief, pg. 2)

It can only be added that no one else should have to apply for administration of the estate of a person deceased for twenty-three (23) years. The appellant strains all powers of credulity by stating that the decedent, Elizabeth Spry perpetrated a fraud of over twenty (20) years, in conspiracy with the appellees, John Spry and Jean Spry Bordley, (appellant's brief, pg. 2), and thus the fraud was not discovered until the death of Elizabeth Spry.

This less-than-artful effort to avoid the statute of limitations will not bear scrutiny. The short answer to the plaintiff's contention is that upon the death of decedent, Elizabeth Jepson Spry, in 1945, the assets or lack of assets of said decedent, was equally within the competence of the appellant, one of the three heirs at law, to discover as well as anyone else. The appellant's assertion is thus open to the defense that the "plaintiff knew, or by the exercise of due diligence could have known, that [she] may have had a cause of action. . . ." *City of Burlington, Vermont v. Westinghouse Electric Corp.*, D.C. D.C. 246 F.Supp. 839 (1965).

The appellant is thus bound by the statute of limitations and "when it appears from the face of a complaint that the action was not brought within the time permitted by the statute, then it is correct to say that the complaint fails to state a claim upon which relief can be granted. Therefore, a motion to dismiss for such failure is permissible under Rule 12(b)." *Reynolds Metals Co. v. McCrea*, D.C. Mun. App. 99 A.2d 84 (1953).

III

The appellant is barred from maintaining this action by the doctrine of laches.

The appellant alleges that certain joint property in the names of the appellee—Jean Spry Bordley and decedent—Elizabeth Spry is, in fact, an asset of the estate of Elizabeth Jepson Spry, who died in 1945. The obvious prejudice to the surviving joint tenant, Jean Spry Bordley, by the passage of twenty-three (23) years, impels the invocation of the doctrine of laches. The appellant seeks to collect assets in the District of Columbia, belonging to appellant's mother who died in Chicago, Illinois twenty-three (23) years ago. The futility of such an exercise is apparent. In addition, the appellant has waited two and one-half

(2½) years after the death of her sister, to allege that said sister deprived appellant of her 'lawful inheritance.'

The appellant has slept on her rights, to the obvious detriment of the surviving joint-tenant, Jean Spry Bordley, and is barred by laches. As this Court said in *Anglo-Colombian Development Co. v. Stapleton*, 57 App. D.C. 209, 19 F.2d 683 (1927):

"The record does not sustain the plaintiff's charge of fraud or concealment, nor that a 'new acknowledgment' of the debit balances as his debt was ever made or intended to be made by Stapleton. Moreover, upon the facts of the instant case, plaintiff's claim should be held barred under the doctrine of laches. In *Hammond v. Hopkins*, 143 U.S. 224, 12 S. Ct. 418, 36 L. Ed. 134, it is said:

'Where there has been no change of circumstances between the parties and no change with reference to the condition and value of the property, a court of chancery will run very nearly if not quite up to the measure of the statute of limitations as applied in analagous cases in a court of law. But where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed, and those who represent his interests are not in a predicament to avail of the explanations which he might have made, out of the charities of the law and in consideration of the fact that fraud is never to be presumed, but must always be proved and proved clearly, the courts limit very much in such cases, the measure of time within which they will grant relief, because the presumption comes, in the aid of the dead man, that he has gone to his account with a clear conscience.' "

The appellant is seeking an accounting for, and a determination of title to, property already before the United States District Court for the District of Columbia in Civil Action No. 1881-66.

On March 19, 1968, appellant moved to consolidate the instant action with Civil Action No. 1881-66. This motion was withdrawn on March 22, 1968. (appellant's brief, page 1a) Appellant, at that time, concluded that "in each case the principle issue is the title and ownership of the following securities . . ." In spite of the fact that the appellant changed her mind, it remains obvious that the property at issue in the instant action is identical to the property at issue in Civil Action No. 1881-66. While the instant action might be viewed by the appellant as having 'nuisance' value, this awkward effort to proliferate litigation certainly does not serve any other function.

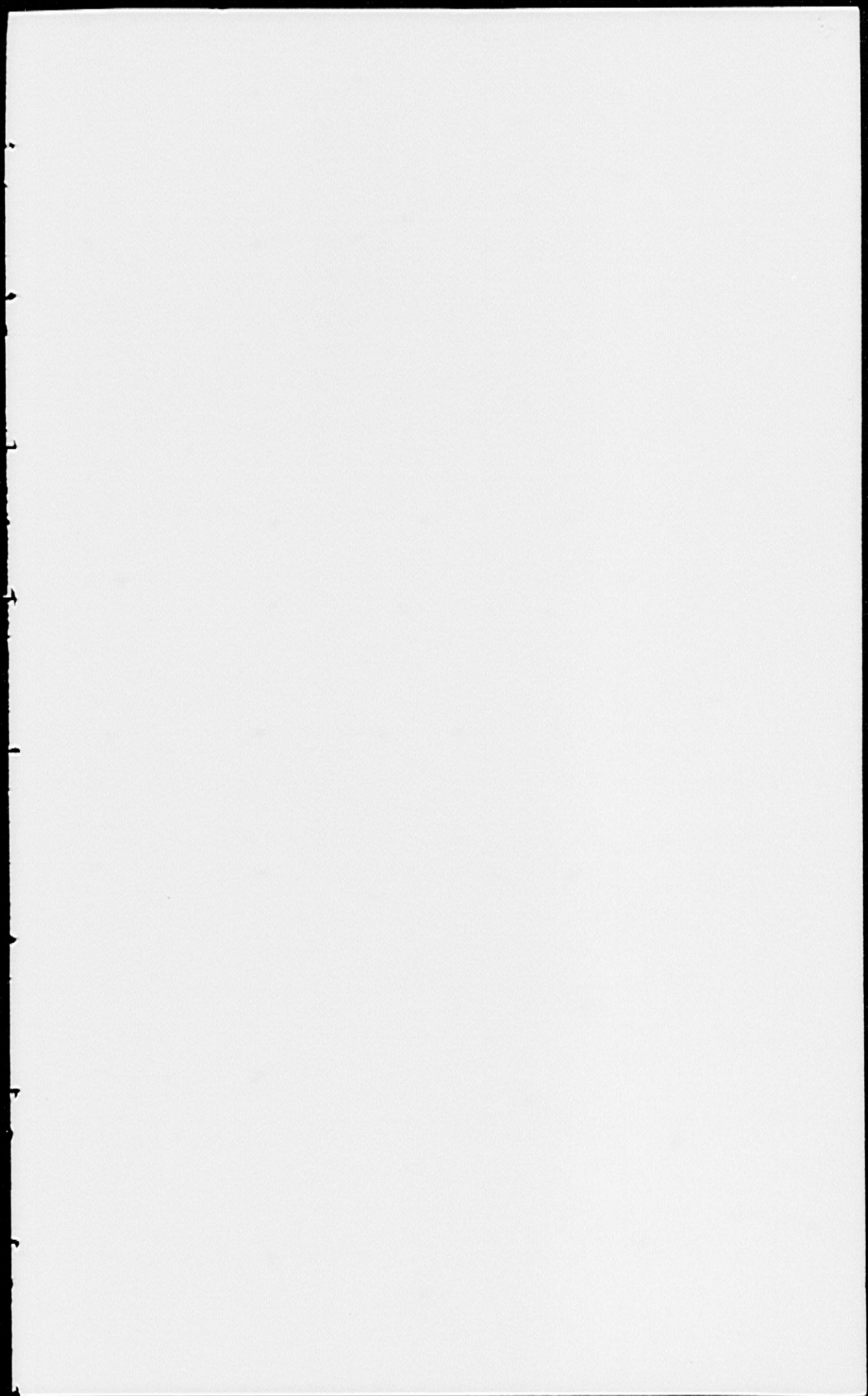
The property, for which the appellant seeks an accounting is before the United States District Court in Civil Action No. 1881-66. That case will enable the Court to render a decision dispositive of all the issues vis-a-vis the property now in question. To allow the appellant to continue the instant action, would raise more issues than it would resolve.

CONCLUSION

Wherefore, appellees John Spry and Jean Spry Bordley, respectfully submit that the judgment of the District Court be affirmed.

Respectfully submitted,

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REPLY BRIEF OF APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 22,189
—

MARCELLA S. HALSTEAD, *Appellant*,

v.

JOHN SPRY, JEAN SPRY BORDLEY and WALTER E. GILLCRIS
ADM., *Appellees*.

—
Appeal From the United States District Court for the
District of Columbia
—

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 13 1969

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,189

MARCELLA S. HALSTEAD, *Appellant*,

v.

JOHN SPRY, JEAN SPRY BORDLEY and WALTER E. GILLCRIS
ADM., *Appellees*.

Appeal From the United States District Court for the
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REPLY BRIEF OF APPELLANT

The following in the opening statement of Appellees John Spry and Jean Spry Bordley is very misleading:

“The Court below did not address itself to the grounds urged by the Appellees”.

The Court below stated clearly:

“THE COURT: Mr. Fitzpatrick, how can I consider that? You are moving to dismiss the complaint on the ground that it is insufficient on the face thereof. If you moved for summary judgment and indicated in your motion that you were relying on these other matters, I could consider them; but a motion to dismiss has to be considered solely on the face of the complaint.”

.

"If you do want me to consider these other matters and you will indicate what matters you want considered, I will give the other side an opportunity to file an opposition and continue this motion." * * *

"MR. FITZPATRICK: Your Honor, at this point I think my position would be that the complaint provides all the information which you need."

Appellees are now attempting to support the decision below, but on other grounds. They are seeking to persuade this Court to overrule the decision of the Court below and thus by indirection to induce this Court to affirm a decision of *Summary Judgment* which the Court below refused to make and on which Appellant has not had an opportunity to be heard.

Appellees' Brief cites no authority to support the decision of the Court below that Appellant is not a proper party to bring this action.

In the Summary of Argument Appellees put forward two points.

- I. Appellant's claim is barred by the Statute of Limitations.
- II. This action is subject to the defense of another action pending. CA 1881-1966.

As to Their Point I:

The provisions of Section 20 of the D. C. Court which they cite do not apply:

Title 20, Sec. 20-201. D.C. Code:

On the death of any person *leaving real or personal estate in the District*, Letters of Administration on his estate may be issued on the application of any person interested on proof satisfactory to the Probate Court that he died intestate * * *.

See also:

D.C. Code, Subchapter 22, Administration, Sec. 20-331
In re Grimes Case, 69 Appeals D.C. 228, 101 F.2d 695

As Appellant's complaint states clearly (Paragraph 2) Elizabeth Jepson Spry died a resident of Chicago, Illinois, without property in the District of Columbia.

The property in issue was brought to the District of Columbia and its existence, location and nature kept from plaintiff by Elizabeth Spry and her brother John Spry and his daughter Jean Spry Bordley, the Appellees in this proceeding, until the death of Elizabeth Spry.

Any Statute of Limitations that might be applicable would not have begun to run until the death of Elizabeth Spry.

The principle of *Wiren v. Paramount Pictures*, 92 U.S. App. D.C., 106 F. 2d 465, 467 (1953), cert. den., 346 U.S. (1954) applies, that is, that in an action for fraud the three year limitation period . . . "begins to run only upon discovery of facts out of which the claim of fraud arose or from the time such facts should reasonably have been ascertained in the exercise of due diligence." See also *E.I. Fontana v. Aetna Casualty and Surety Company*, 124 U.S. Appeals D.C. 168, 263 F.2d 297 (1966). In relation to such requirements, on a motion to dismiss, this Court said in *Page v. Commert et al.*, 100 App. D.C. 139, 243 F. 2d 245, 246 (1957), "this allegation of discovery of alleged fraud contemporaneously with the filing of a complaint disposes of appellees' contention based on the Statute of Limitations (D.C. Code, Sec. 12-201, 1951), at least for the purposes of the motion to dismiss" in this case.

II. The Pendency of Civil Action No. 1881-1966.

Appellees submit no argument or authorities supporting this as a ground for dismissal of this proceeding.

Appellee Jean Spry Bordley is the Plaintiff in that action and Appellee Gillerist as Administrator of Elizabeth Spry is Defendant.

Appellant is not and could not be joined as party to that action.

Appellee's only charge is that of proliferation. This charge deserves a reply in kind.

That case has been pending so long that on January 11, 1969, it became subject to dismissal under Rule 13 of the Rules of the District Court, if in 6 months it is not noticed for trial. Appellant charges that Appellees have been and are using that Action, to which Appellant cannot be made a party, to delay and if possible, prevent the consideration of Appellant's claims by any Court. After 3½ years, Appellant is entitled to her day in Court to present this claim to her share in the estate of her family.

CONCLUSION

On the basis of the arguments and authorities set out in Appellant's Main Brief, it is submitted that the decision of the Court Below should be reversed.

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